RE ABDUL RAHMAN MOHAMAD, EX P PUBLIC FINANCE BHD

HIGH COURT SABAH AND SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[BANKRUPTCY PROCEEDING NO: 29-332-99(II)]
28 APRIL 2000

BANKRUPTCY: *Petition - Act of bankruptcy - Failure to state exact date of act of bankruptcy - Whether a formal defect or irregularity - Whether curable by amendment - Bankruptcy Act 1967, s. 131*

This was an appeal against the decision of the deputy registrar's decision to strike out the judgment creditor's petition on the ground that the said petition did not state the exact date when the act of bankruptcy was committed.

Held:

[1] The omission to state the date or a wrong date of the act of bankruptcy cited in Form 6 was a mere formal defect or an irregularity which could be cured by an amendment at the hearing of the petition. It did not render the petition defective.

[Appeal allowed; petition to be reinstated by inserting date of act of bankruptcy therein.]

Case(s) referred to:
Au-Yong v. Dicum & Anor [1963] 29 MLJ 349 ***(refd)***
Low Mun v. Chung Khiaw Bank Ltd [1988] 1 MLJ 263 ***(dist)***
Re Arif Sionggong ex p, Arab Malaysian Finance [1995] 4 BLJ 359 ***(foll)***
Re Fadzil Othman ex p Malayan Banking Bhd [1994] 2 MLJ 474 ***(refd)***
Re Lim Sau Chiang ex p, Hong Leong Bank Bhd; Bankruptcy Petition No: K 29(P)-61 of 1994 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Rules 1969, r. 247

For the petitioning creditor - Jane Lim; M/s Lim & Teo
For the official assignee - Ko Fui Loong; Official Assignee's Department

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

This is an appeal against the learned deputy registrar's decision to strike out the appellant's petition on the ground that the said petition did not state the exact date when the act of bankruptcy was committed. In striking out the petition the deputy registrar held that he was bound by the decision of the case *Re Lim Sau Chiang ex p, Hong Leong Bank Bhd*, in Bankruptcy Petition No: K 29(P)-61 of 1994, High Court at Kota Kinabalu (unreported).

Learned counsel for the judgment creditor submitted that in *Re Lim Sau Chiang (supra)* the learned judicial commissioner had refused to follow the case of *Re Fadzil Othman ex p Malayan Banking Bhd* [1994] 2 MLJ 474. But in a later case of *Re Arif Sionggong ex p, Arab Malaysian Finance Bhd* [1995] 4 BLJ 359 the same judge applied with full vigour the decision of *Re Fadzil Othman* essentially on a similar principle. Further, she submitted that the failure to state the exact date when the act of bankruptcy was committed, was a mere irregularity which could be amended under s. 131 of the Bankruptcy Act 1967.

Mr. Ko Fui Loong of the official assignee's department averred that the omission to state the exact date of the act of bankruptcy in the petition rendered the service of the petition bad, and he cited the case of *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 where, at p. 264, Azmi SCJ stated:

> ... that the technical irregularities either in the form of typing errors or otherwise in the service of the bankruptcy notice are curable under section 131 and rule 247 of the bankruptcy legislation. We are therefore of the view that such formal and typographical defects or irregularities, even if wholly proved, cannot invalidate the bankruptcy proceedings in this case.

The official assignee was of the opinion that the omission to state the date of the act of bankruptcy in the petition was an irregularity which was not amendable to s. 131 and r. 247. It followed therefore that the service of the petition was bad.

With respect, the *ratio decidendi* of *Low Mun*'s case *(supra)* can be distinguished in that the technical irregularities either in form of typing errors or otherwise in the service of the bankruptcy notice are curable under s. 131 and r. 247 of the bankruptcy regulation. In the present case, we are not concerned with the service of the bankruptcy notice. The date of advertisement of bankruptcy notice was 22 June 1999 and the bankruptcy notice was deemed to have been served on 3 July 1999 (*ie*, ten days after publication). The judgment debtor had committed an act of bankruptcy on 11 July 1999, *ie*,

seven days after service of the notice. The petition was filed on 9 September 1999 and the judgment debtor was deemed to have knowledge of the petition and he had more than ample time within which to take an action if he so desired.

In my view, the omission to state the date or a wrong date of the act of bankruptcy cited in Form 6 is a mere formal defect or an irregularity which can be cured by an amendment, at the hearing of the petition. It does not render the petition defective. See *Low Mun*'s case *(supra)*. There is no provision in the bankruptcy law which prohibits that a technical error cannot be corrected. If the date of act of bankruptcy is mistyped or otherwise, it is remediable under s. 131 of the Act.

In *Lim Sau Chiang*'s case, the learned judicial commissioner referred to two cases of *Au-Yong v. Dicum & Anor* [1963] 29 MLJ 349 and *Re Fadzil Othman (supra)*, and held that the failure to state the date of the act of bankruptcy in the petition was not a mere formal defect which could not be remedied. In *Au-Yong*'s case, the judgment debtor appealed to the Court of Appeal on the ground that he did not commit any act of bankruptcy for reasons that the petition was not properly served on him. The service was effected by substituted service, and the unsealed copies of the petition were posted on the notice board of the Supreme Court, magistrate's court and on the front door of the judgment debtor's last known address. The court held that:

> Bankruptcy rule 9 provides in terms that all summonses, petitions, notices, orders, warrants or other process issued by the court shall be sealed. It is to be noted that that this mandatory rule refers to all notices which on the application of the maxim *qui omni dicit nihil excludit* must include copies of notices. In my opinion that rule alone would have been sufficient authority.

In *Re Fadzil Othman*'s case, the court dismissed the petition for failure to state therein the date of the act of bankruptcy. This case was not followed by the case *Re Arif Sionggong (supra)*, which held that the failure to state the correct date of the act of bankruptcy in the petition was "merely a formal defect or irregularity and not in substance which was remediable under s. 131 of the Act as no substantial injustice has been caused by it." This seems to be a more acceptable proposition of the law and it is correct. In the instant case, the failure to state the date of the act of bankruptcy is a formal defect or irregularity which may be amended and would cause no injustice to the judgment debtor.

I would in the circumstances, allow the appeal and reinstate the petition with the amendment by inserting the date of the act of bankruptcy therein.